

Exhibit 7

September 20, 2022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HERMES INTERNATIONAL AND HERMES OF
PARIS, INC.

Plaintiff, :

- against -

MASON ROTHSCHILD,

Defendant. :

-----X

September 20, 2022
11:05 a.m.

** CONFIDENTIAL **

VIDEOTAPED EXAMINATION BEFORE TRIAL of
DR. BRUCE ISAACSON, an Expert Witness on
behalf of the Plaintiffs herein, taken by the
Defendant, pursuant to Court Order, held at
the above-mentioned time via videoconference
by all parties, before Michelle Lemberger, a
Notary Public of the State of New York.

September 20, 2022

A P P E A R A N C E S:

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ALSO PRESENT:

Darrak Lighty - videographer

* * * * *

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S T I P U L A T I O N S

IT IS HEREBY STIPULATED AND AGREED by
and between the attorneys for the respective
parties herein, that filing, sealing and
certification be and the same are hereby
waived.

IT IS FURTHER STIPULATED AND AGREED
that all objections, except as to the form of
the question shall be reserved to the time of
the trial.

IT IS FURTHER STIPULATED AND AGREED
that the within deposition may be signed and
sworn to before any officer authorized to
administer an oath, with the same force and
effect as if signed and sworn to before the
Court and that a copy of this examination
shall be furnished without charge to the
attorney representing the witness testifying
herein.

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1
2 VIDEOGRAPHER: This is the
3 remote video deposition of Dr. Bruce
4 Isaacson in the matter of Hermes
5 International and Hermes of Paris,
6 Inc. versus Mason Rothschild.

7 Today's date is September 20,
8 2022 and the time is 11:05 a.m.,
9 New York time. My name is Darrak
10 Lighty with U.S. Legal Support and I
11 am the remote video technician.

12 The court reporter today is
13 Michelle Lemberger also associated
14 with U.S. Legal Support. All
15 participants will be noted on the
16 stenographic record and now the court
17 reporter will recite stipulations and
18 swear in the witness.

19 THE REPORTER: Counsel, do I
20 have your consent to swear the
21 witness remotely?

22 MR. MILLSAPS: Yes.

23 MR. FERGUSON: Yes.

24 THE REPORTER: Please state
25 your name for the record.

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THE WITNESS: My name is Bruce
Isaacson, last name is spelled
I-S-A-A-C-S-O-N.

THE REPORTER: What is your
current business address?

THE WITNESS: 16501 Ventura
Boulevard, Suite 601, Encino,
E-N-C-I-N-O, California 91436.

B R U C E I S A A C S O N having been first
duly sworn by a Notary Public of the
State of New York, was examined and
testified as follows:

EXAMINATION BY

MR. MILLSAPS:

Q. Good morning, Dr. Isaacson.

A. Good morning.

MR. FERGUSON: Apologies,
Mr. Millsaps. Before we begin, can
we also stipulate that this
transcript will be treated as
confidential as we've been doing in
other proceedings?

MR. MILLSAPS: Sure.

MR. FERGUSON: Thank you.

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2 practice. I can say there appears to be
3 criticisms of my survey based on that
4 practice.

5 Q. And with respect to the 20
6 individuals identified here in your report,
7 the 20 respondents, how do you know that it
8 was proper specifically to include these 20
9 respondents?

10 MR. FERGUSON: Objection.

11 A. You mean specifically to exclude
12 these 20 respondents, correct?

13 Q. Did I say include?

14 MR. FERGUSON: That was my
15 objection, yes.

16 Q. I'm sorry, yes.

17 How did you know it was proper,
18 specifically to exclude these 20 respondents,
19 yes?

20 A. Well, I explained that in my report.
21 I looked at the amount of time that they had
22 taken to complete the survey and if the
23 amount of time that they had taken to
24 complete the survey was either suspiciously
25 long or suspiciously short I removed them.

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2 And I also removed people whose
3 verbatims indicated that they, obviously,
4 were not paying attention in the survey. And
5 as I mentioned before, this is consistent
6 with the practice that I followed for every
7 other litigation survey that I've ever
8 conducted. I've never been criticized for it
9 by another expert. I've never been
10 criticized for it by another court, and I've
11 never criticized another expert for this kind
12 of a practice.

13 And other experts routinely do this
14 as well. And trade associations talk about
15 this practice, who deal with surveys --
16 academic experts talk about this practice.
17 This is a widely-used set of activities, and
18 in my report I explained how I did this
19 particular -- this set of removals.

20 Q. So if I'm understanding you
21 correctly, your decision was based on your
22 coding of the specific responses; is that
23 right?

24 A. I want to be very clear today when
25 we use the word coding. Because I think

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2 there's been some back and forth by e-mails
3 prior to today about what I did and there are
4 two definitions for the word coding. And if
5 it's okay, I'd like to distinguish between
6 these two definitions.

7 Q. Please.

8 A. There is one -- there is one set of
9 definitions for the word coding which is
10 usually what I mean when I say the word
11 coding, and that is when you look at a
12 verbatim comment and you assign numbers to it
13 to reflect the themes that are inherent in
14 that particular comment.

15 And in my case, in my survey, I did
16 that kind of coding and those codes were
17 provided in one of the exhibits to my report.
18 I want to get you the exact exhibit number.

19 Exhibit 5 to my report provides the
20 codes that I used for coding and those codes
21 reflect the activity where I'm looking at the
22 verbatim comments that people provided and
23 assigning categories to reflect the themes
24 inherent in those comments. That's the only
25 thing that I mean when I talk about coding.

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2 When we identify respondents for
3 removal from the survey, I don't use the word
4 coding to describe that activity, nor am I
5 aware of other survey experts who would use
6 the word coding to describe that activity.

7 And so I want to distinguish between
8 removing respondents from the database and
9 assigning verbatim comments to codes that
10 reflect themes that are relevant to the
11 analysis.

12 Q. So I understand your process, what
13 you're saying is you looked at the responses
14 from the individual respondents, you
15 identified these 20 respondents specifically
16 as having given responses that would exclude
17 them, and then you removed them; is that
18 right?

19 MR. FERGUSON: Objection.

20 A. Correct.

21 MR. FERGUSON: I think that
22 mischaracterizes his testimony. Not
23 all 20 were removed based on
24 responses, the content of the
25 responses.

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2 A. I think generally what you're saying
3 is correct. I looked at these 20
4 respondents, I looked at all of the
5 respondents, and I identified either based on
6 time criteria or on the nature of the
7 verbatims, these 20 for removal from the
8 database.

9 So these 20 were never given the
10 verbatim codes that were listed in Exhibit 5,
11 but they were identified through the process
12 that you and I just discussed for removal
13 from the database.

14 Q. So let's look at Exhibit 7 of your
15 report which is page 129 in the PDF, it
16 begins there.

17 What is Exhibit 7 to your report?

18 A. Exhibit 7 is a summary of
19 respondents who either terminated in the
20 survey or were removed from the survey
21 database.

22 Q. Okay. And if we go to the page 1 of
23 that exhibit, and we look at this -- the
24 numbers here, do you see the 13, the 5 and
25 the 2 respondents towards the bottom

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2 A. We just talked about that process.

3 I personally went through the database,
4 assisted by staff at my firm, and identified
5 respondents with nonresponsive verbatims or
6 problems with the time that they took to
7 complete the survey. Those respondents were
8 removed from the database.

9 We recorded the summary of what we
10 removed, that left me with the final
11 database, and then I analyzed that database
12 and reported that the entirety of that
13 database in my expert report.

14 Q. And at the time, were those -- how
15 were those respondents removed at the time?

16 A. In Excel, I've already answered
17 that.

18 Q. So did you just delete the rows from
19 the Excel spreadsheet as you went through to
20 remove those respondents?

21 A. Well, at some point they -- we
22 didn't delete their data from our records,
23 but we did delete those respondents from the
24 database that we were analyzing.

25 So the answer is both yes and no to

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2 your question.

3 Q. And your testimony is that you
4 identified which particular respondents you
5 removed in Excel?

6 A. Yes. And I should add that I have
7 three times identified those respondents and
8 provided all of that data to counsel. And I
9 believe counsel has provided that information
10 to you as well. I guess -- no, I'll stop
11 there.

12 Q. Where is that list of respondents in
13 Excel?

14 A. I've provided that list three times
15 to counsel. And counsel, as far as I know,
16 has provided that to you.

17 MR. FERGUSON: I'll represent
18 that that's been provided,
19 Mr. Millsaps.

20 Q. I'm trying to figure out where it
21 was -- I'm sorry, let me -- I'm just going
22 to -- we're going to have to walk them in
23 Excel so you can show me and I'm going to go
24 to the next exhibit.

25 Let's look at -- we'll mark this as

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2 Exhibit 2.

3 (Whereupon, at this time, the
4 reporter marked the above-mentioned
5 Excel data file as Exhibit 2 for
6 identification.)

7 Q. This is a file provided to us by
8 counsel, by Hermes' counsel on August 31st.
9 The file is labeled Isaacson full data file
10 NFT 8-30-22.XLXS.

11 Dr. Isaacson, are you able to
12 download this Excel file and open it?

13 A. I believe so, and I'm in the process
14 of doing so now.

15 I'm trying to do this without
16 closing Zoom which I did last time which
17 caused some technical issues.

18 Q. No problem. We'll take the time.

19 A. Thank you.

20 I have the file open.

21 Q. Okay. So when did you create this
22 document?

23 A. I apologize, I'm going to need
24 another minute.

25 Q. Okay.

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2 A. We're going to have to go off the
3 record again, if you're going to want me to
4 look at this. I apologize, I'm on a laptop
5 that's not mine, and I'll need to set up my
6 laptop so I can look at this file.

7 Q. We should do that. We won't exclude
8 you for, you know, your response time. It's
9 not a problem.

10 A. Well said.

11 Q. We're going to look at several Excel
12 files so we should get the tech up and
13 running.

14 A. Okay.

15 Q. We'll go off the record for, shall
16 we say, five minutes, ten minutes?

17 A. I'd say, let's take a ten-minute
18 break and come back at six past the hour, if
19 that's okay.

20 VIDEOGRAPHER: All right.

21 Going off the record, the time is
22 11:56 a.m. New York time.

23 (Whereupon, a brief recess was
24 taken.)

25 VIDEOGRAPHER: The time is

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2 12:08 p.m. New York time. We're back
3 on the record.

4 BY MR. MILLSAPS:

5 Q. Dr. Isaacson, during that little
6 break, did you review any documents?

7 A. I did not.

8 Q. Okay. So let's go to that Excel
9 file that we were just looking at, if we
10 could, which is Exhibit 2.

11 Can you point me in this Excel file
12 to where you identify the 20 respondents that
13 were removed?

14 A. Sure. They're in the tab labeled
15 all starts NFT purchasers.

16 Q. Okay. And where would I look there
17 to find them?

18 A. Well, you'd locate the
19 respondents -- you want me to walk you
20 through the process?

21 Q. Yes.

22 A. Okay. And I'll just say for the
23 record that I provided this file in response
24 to a very specific request that came from
25 opposing counsel, and that request was for

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2 all respondents who completed the survey and
3 all respondents who started the survey.

4 I was not, at that point, asked for
5 nor do I keep in the normal course of
6 business, a separate file that only has the
7 20 respondents in it. I did, I'll also point
8 out for the record, eventually provide a file
9 that only had the 20 respondents in it. But
10 this was -- this file can be used to identify
11 easily to identify the 20 respondents, but
12 the reason this file is in the format it is
13 in is because this is how I keep things in
14 the normal course of my business, and also
15 this is what I was requested -- this is what
16 the request came in asking for.

17 There are two tabs in this file.
18 One of the tabs says, data file NFT
19 purchasers, and the other says, all starts
20 NFT purchasers. I'm going to refer to the
21 two tabs as the data file and the all starts
22 file, if that's okay.

23 Q. Yes.

24 A. The data file -- the data file
25 contains the 201 respondents who completed

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2 the survey and who were in the final database
3 for the survey. The all starts tab contains
4 thousands of respondents and as I mentioned
5 before, it contains so many respondents
6 because that's all of the respondents who
7 started the survey.

8 But it is very easy using that all
9 starts file to identify the respondents
10 who -- to identify the respondents -- only
11 the 20 respondents who were removed from the
12 survey database. And the way that one would
13 do that is one would look in the all starts
14 file, one would go to column AZ, and the top
15 of that column in row A -- in cell AZ 1
16 has a -- says Q 11.

17 Q 11 refers to question 11. Every
18 one of these columns in the all starts tab
19 and in the other tab has a column header that
20 the top row of that column lists something
21 that refers to either a question from the
22 survey or the analysis of that question. In
23 this case, that is question 11 in the survey.
24 Question 11 was the last question that was
25 asked in the survey database.

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2 So the first step in this process is
3 to filter the all start database to identify
4 only the respondents who completed the
5 survey. And that is all of the respondents
6 who in question 11 would have a 1 and would
7 not have a blank and would not have a 2.

8 A blank would mean that they were
9 never asked question 11, and a 2 would mean
10 that they did not respond yes to question 11.

11 So we're looking for -- we would
12 first, in the first step we would filter on
13 column AZ to identify everyone who had
14 provided a 1 in response to question 11.
15 That would identify the 221 respondents who
16 completed the survey. And then all that one
17 would have to do once one had done that, is
18 then one would compare between the data file
19 and the all starts file using the sample IDs.

20 Any sample ID that was contained in
21 the all starts -- in the all starts tab, that
22 had a 1 for question 11, and that was not
23 contained in the data file tab would be
24 some -- would be one of -- there will be only
25 20 people like that, and that will be the 20

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2 decided to remove for that reason?

3 A. I just explained that.

4 Q. Well, my understanding of what you
5 just explained is that we could look at the
6 responses and sort of guess based on our own
7 evaluation of the responses that you removed
8 them for that reason. But is there an actual
9 notation that shows, I removed this
10 respondent for this particular reason?

11 MR. FERGUSON: Objection of
12 form.

13 A. I just want to be clear, you
14 wouldn't be guessing, because you'd be
15 looking at the timestamp and you'd be looking
16 at the verbatims. So you could use that if
17 you wanted to identify the reasons for
18 removal.

19 Q. Does the spreadsheet tell us which
20 verbatim comments aren't responsive?

21 A. By looking at the verbatim comments,
22 you can identify the ones that are not
23 responsive. Or you can, again, you have a
24 separate database which identifies separately
25 and adds a field for each of the two reasons

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2 that we're talking about for removal.

3 Q. So on the database that we're
4 looking at here, the one that we're talking
5 about, Exhibit 2, you say we can look at the
6 responses and identify which ones are not
7 responsive. We can look at the verbatim
8 comments and identify those.

9 Does that not require a judgment
10 call by the person who is looking at the
11 responses?

12 A. Number one, I think it's pretty
13 clear from looking at the verbatim comments
14 which of those are not responsive. And
15 number two, I also want to be clear that I
16 provided this database in response to a
17 specific request that came from opposing
18 counsel.

19 We're talking about respondents who
20 I did not rely upon for my analysis, and
21 we're talking about a database that fit the
22 requirements. I was not asked by opposing
23 counsel when I produced this database for a
24 separate list of respondents that I removed
25 from the database with the reason for removal

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2 for each of those respondents. That's not
3 something that's normally provided in the
4 normal course of conducting litigation
5 surveys, because it's not something that
6 survey experts rely upon.

7 So if you're asking me why is there
8 not a field here to identify the specific
9 verbatim comments that I deemed to be
10 nonresponsive, it's because I don't normally
11 keep that in the normal course of my
12 business. It's because survey experts don't
13 normally keep that as part of
14 generally-accepted practices.

15 And the reason they don't is because
16 we're talking about data that I did not rely
17 upon, but later when I was asked, can you
18 identify each of the reasons why you removed
19 each of the people that you removed, I
20 provided a separate database that provided
21 that.

22 Q. So just so I understand, you
23 provided that separate database after you
24 provided this database because this database
25 would not have allowed for that information

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2 to be known?

3 MR. FERGUSON: Objection.

4 A. No, you're misstating what I said.

5 I believe that this database would
6 have allowed that information to be known,
7 but it appeared from the e-mails that counsel
8 for Hermes was forwarding me from opposing
9 counsel, that opposing counsel seemed to be
10 claiming that they were having some
11 difficulty identifying those people.

12 I don't think it was difficult to
13 identify from what I provided, but I also
14 want to be clear that I wasn't asked to
15 provide that. I wasn't asked for the reasons
16 for each of those people to be -- that why
17 they were removed, nor do I keep that in a
18 separate database as part of my normal course
19 of business activities.

20 But I created that database, that
21 separate database that only had the
22 exclusions along with the reasons for
23 exclusion, to respond to e-mails from
24 opposing counsel claiming that they couldn't
25 figure out something that I thought was --

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2 excluded people. As I indicated, you have
3 the timestamp, you have the verbatim
4 comments, and in response to requests from
5 opposing counsel, that they couldn't figure
6 out something that I think is very clear from
7 working with this database, particularly for
8 someone who does this on a regular basis, we
9 provided this in an even easier format.

10 But I believe that it's very
11 straightforward to work through what we did
12 based on the data that we've provided here.
13 And the fact that someone is in one tab as
14 opposed to being in the other tab tells you
15 that we didn't include them and then you have
16 the timestamp data, and then you have the
17 verbatim data.

18 And if that wasn't enough, we then
19 went ahead and created something in response
20 to make sure that opposing counsel could sort
21 this out.

22 Q. You keep saying that you created
23 this in response to a request by opposing
24 counsel. Was this data comparison possible
25 in any information that you provided in the

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2 exhibits to your report?

3 A. The exhibits to my report did not
4 provide the data for people who had not
5 completed the survey. As I mentioned before,
6 I don't normally provide that. And survey
7 experts don't normally provide that,
8 certainly not in the confines of an expert
9 report.

10 The reason why I did provide that is
11 because I was -- the reason why we provided
12 the all starts tab, which I thought was an
13 unusual request but I received the request
14 from opposing counsel, I forget the exact
15 phrasing, but the phrasing was something
16 like, everybody who ever started the survey.

17 And so we provided a database in
18 response to what we were provided. I was not
19 asked to only provide -- at that point in
20 this process, I had not been asked to only
21 provide the people who we had removed from
22 the survey database, and I was never asked to
23 specifically indicate the reasons for
24 removal.

25 Had I received a request like that

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2 earlier, I would have talked to counsel for
3 Hermes and I would have been happy to provide
4 something earlier. But the reason why this
5 database in Exhibit 2 is in the form that it
6 is in is because it was responding to the
7 specific request that I received from
8 opposing counsel, which is not what you're
9 asking me about right now.

10 You're asking me -- you asked me for
11 one thing and then you're asking me why it
12 wasn't something else. And it wasn't
13 something else because you asked me for
14 what -- because I provided what opposing
15 counsel asked me for.

16 Q. Just so I understand what you're
17 saying, so am I right that you're essentially
18 saying that you don't believe it's important
19 to provide with your report information that
20 identifies those that you removed from a
21 survey?

22 A. I don't, as a normal matter of
23 course, nor do other survey experts include
24 data from people who don't complete the
25 survey. To take an example, except to

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2 Q. Okay. Why does the year matter?

3 A. Well, I've conducted this survey in
4 2022, and my understanding is that Mr. Warhol
5 made his paintings in the 1960s. So the
6 world was different back then.

7 He was also making a physical
8 painting involving the, as I mentioned, a
9 commonly purchased item. Here it's a very --
10 it's a very different time, it's a very
11 different context. It's a different medium
12 that he's using to create the item. And so
13 it's two very different set of circumstances.

14 I'm not a lawyer, but I would
15 imagine the law has changed since the 1960s
16 with regard to these kinds of issues, and I
17 know the marketing -- the way that brands
18 treat marketing, which is something that I
19 know something about, has changed a lot since
20 the 1960s.

21 Back in the 1960s, brands didn't
22 worry about social media. So there's a lot
23 that's different in the context today and
24 there's a lot back in the 1960s; the kind of
25 format that I use for this particular survey

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2 hadn't been invented.

3 So it's just, there's a lot
4 different in the context today versus when
5 Mr. Warhol was working with Campbell soup
6 cans.

7 Q. Okay. So taking that hypothetical
8 example of the survey over the Campbell Soup
9 cans, sitting here today, you can't say
10 whether someone who gave a response in such a
11 survey distinguishing between the painting
12 and the soup was making a distinction between
13 two different things?

14 MR. FERGUSON: Objection.

15 A. I think I said it. There's a lot to
16 think about with regard to a survey like
17 that, and I'd have to think about with regard
18 to the design. But I can say that the way
19 that likelihood of confusion surveys work is
20 you're looking for cognitive connections.

21 You're looking for people who see
22 one item and make a connection to another
23 item. So in this case, what my survey
24 measures is whether when someone looks at the
25 MetaBirkins web page and sees a fur-covered

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2 bag, that looks, still has the shape of a
3 Birkin and uses the word Birkin and has
4 Hermes in the disclaimer. Whether that's
5 enough to trigger a cognitive connection,
6 where they believe that what they're looking
7 at comes from Birkin and/or Hermes. And I
8 believe this respondent ID 101 has clearly
9 demonstrated that that is the case for them.

10 Q. Are you saying --

11 A. I don't know what a Campbell Soup
12 survey would look like, but I didn't design a
13 Campbell Soup survey.

14 Q. Okay. Are you saying that the
15 cognitive connection and confusion are the
16 same thing?

17 A. What I'm saying is that from a
18 survey standpoint, what a likelihood of
19 confusion survey measures is whether people
20 make a cognitive connection between an
21 accused item and usually the plaintiff in the
22 case, or between an accused item, let me say,
23 and another item.

24 The survey measures cognitive
25 connections. You're showing one thing and

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2 seeing whether they think it's something
3 else. And this person, we showed them
4 MetaBirkins and they thought it was Hermes,
5 and they said so twice.

6 Q. So is your survey only measuring a
7 cognitive connection?

8 A. That's the mechanics of how the
9 survey works, is by people making a cognitive
10 connection between two things that have a --
11 that had some alleged elements of similarity
12 in them.

13 Q. Let's look at response ID number 18.

14 I'm sorry, can we go back to 101 for
15 a second? Just looking back at 101 that we
16 were just discussing, can you tell me why
17 this respondent was not excluded as providing
18 open-ended responses that reflected lack of
19 attention?

20 A. Because they didn't provide
21 open-ended responses that reflect lack of
22 attention.

23 Q. And how did you determine that?

24 A. By looking at their responses.

25 Q. Okay. Can you walk me through how

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2 handbag purchaser survey; is that right?

3 A. That's correct.

4 Q. And which of those surveys do you
5 rely on when you draw your conclusions about
6 confusion in this matter?

7 A. The NFT survey.

8 Q. Am I correct that you're not relying
9 on any of the results from your handbag
10 purchaser survey for your conclusions about
11 confusion here?

12 A. Correct.

13 Q. So are you relying on the handbag
14 survey as the basis for any opinions in this
15 matter?

16 A. No.

17 Q. Are both of the surveys you
18 conducted scientifically valid and reliable?

19 A. Yes.

20 Q. Did you conduct any additional
21 surveys that are not discussed in your
22 report?

23 A. No.

24 Q. To your knowledge, did anyone else
25 conduct any surveys not discussed in your

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2 report?

3 A. No. Well, let me say I don't know
4 of any, but I haven't asked for any other
5 surveys that anyone else might have
6 conducted.

7 Q. Fair enough. I was asking to your
8 knowledge.

9 Going back to your report, am I
10 correct that your first survey was the survey
11 of NFT purchasers?

12 A. No.

13 Q. Your first survey was --

14 A. Let me be more clear in that answer.

15 They were both conducted
16 simultaneously.

17 Q. Okay. And your survey of handbag
18 purchasers showed that MetaBirkins NFTs were
19 not causing any confusion among that
20 universe; am I right?

21 MR. FERGUSON: Objection.

22 A. No, you're not correct.

23 Q. Dr. Isaacson, didn't your handbag
24 purchasers survey find a net confusion level
25 of 3.6 percent?

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2 A. Yes, approximately 3 -- around -- I
3 don't remember the exact number but I'm
4 willing to accept. Well, let me look it up
5 and just confirm the number for you, since
6 we're talking about it.

7 Q. Okay.

8 A. The answer to your question is, yes,
9 that was the net measure from the survey.

10 Q. And in your opinion, is a net
11 confusion level of 3.6 percent evidence of
12 the presence or absence of confusion?

13 A. A net confusion level of 3.6 percent
14 would normally be associated with the absence
15 of confusion, but it's also important to
16 remember that the survey didn't show no
17 confusion. What the survey showed is control
18 cell confusion that was almost equal to the
19 test cell confusion.

20 The control cell confusion was 3.6
21 percent lower than the test cell confusion.
22 So when you look at the results and you want
23 to understand that 3.6 percent, what's
24 happening is that people in the test cell
25 were playing back Hermes or Birkin to -- to a

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2 not insubstantial percentage, 18.8 percent.

3 And even people in that universe who
4 see the control web page were also responding
5 with Hermes or Birkin, in this case to 15.2
6 percent.

7 So this is why I disagreed with your
8 statement earlier that it doesn't show any
9 confusion. It does show confusion. It just
10 shows almost equal confusion on the control
11 cell as on the test cell. That's why the
12 results for the survey are low.

13 Q. Okay. And in your results, is there
14 a reason that you focus on the net confusion
15 level?

16 A. I don't think I focused on either
17 confusion level in my results. I provided
18 the results, but I didn't indicate -- I
19 haven't -- before you asked me just a few
20 minutes ago, I didn't interpret the results
21 in any way in my report.

22 Q. The control specifically is meant to
23 eliminate any features that would be
24 infringing, right?

25 A. It's meant to eliminate any features

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2 my fingers mistyped, I meant to say Mason
3 Rothschild or some kind of an answer like
4 that, then we have to rethink your question 1
5 answer. But we don't see any people taking
6 back their answers to prior questions.

7 So short of that, if you said you're
8 confused in question 1, you could say in
9 question 1, Hermes, and in question 4 you
10 could say Instagram, or you could say
11 something else, and then we'd still count you
12 as confused.

13 Q. Okay. So going back to your -- the
14 language in your questions that we were just
15 looking at, 1, 4, and 7, the questions that
16 say, quote, whoever makes or provides the
17 items shown on the web page. What did you
18 intend that language to refer to?

19 A. The items that are shown on the
20 MetaBirkin web page.

21 Q. Yes. And what are those items?

22 A. Well, on the web page, you and I
23 were just looking at it a minute ago, but
24 it's the web page that is included in Exhibit
25 2. So it includes the item that is --

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2 it's -- that the web page, to my eye, appears
3 to be marketing or selling are a series of
4 handbag images that are sold as a form of NFT
5 products.

6 Q. Okay. And so your understanding is
7 that they're selling images that are
8 depicting handbags?

9 A. They're selling what the page refers
10 to as Meta handbags or -- I'm sorry, that's
11 the control version. The test version refers
12 to what the page is referring to as
13 MetaBirkins. And it specifically says it's a
14 collection of 100 unique NFTs, right at the
15 top of the page. And there's a series of
16 images that reflect these MetaBirkins
17 handbags on the page.

18 So the question is intentionally
19 using the word items, though, to be
20 non-leading to the respondent about what it
21 is that they're looking at. It doesn't refer
22 to these items as NFTs, it doesn't refer to
23 them as artwork, it doesn't refer to them as
24 products.

25 It refers to them as items, which

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2 standard language in a survey like this to
3 not lead the respondent to look at one
4 particular element on the page as opposed to
5 looking at another element on the page.

6 Q. So is it possible that a respondent
7 read the question and thought that you were
8 referring to the Meta -- the NFT images and
9 another respondent could read the question
10 and think that you're referring to the Birkin
11 handbag that the image depicts or references?

12 MR. FERGUSON: Objection to
13 form.

14 You can answer.

15 A. That respondent you just described
16 is confused. You just described the textbook
17 definition of confusion in the likelihood of
18 confusion survey, that second one.

19 If I see that MetaBirkin image and I
20 think it's a Birkin handbag, I'm confused.
21 If I see that MetaBirkin image and I think
22 it's a MetaBirkin made by Mason Rothschild
23 and I don't think of Hermes and I don't think
24 of the real Birkin bag, then I'm not
25 confused. That's exactly what my survey

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2 measures.

3 Q. I'm asking you, is it possible that
4 someone reads the questions here, the
5 language in 1, 4 and 7, where it says, Makes
6 or provides the item shown on the web page,
7 and one person thinks that the item shown on
8 the web page is an NFT image of a handbag,
9 and another person reads that and thinks the
10 item shown on the web page is an actual
11 Birkin handbag.

12 MR. FERGUSON: Objection.

13 A. I have no idea what the question is
14 that you're asking me. I apologize. I know
15 it has something to do with the word item,
16 but I don't understand the hypothetical
17 scenario that you're trying to describe.

18 Q. It's not a hypothetical at all. I'm
19 asking you, you show the test stimulus, which
20 shows the image, right, of the MetaBirkin,
21 and you ask in several of these questions, 1,
22 4, 7, what company, companies, person or
23 people, do you think makes or provides the
24 item shown on the web page.

25 Is it possible that a respondent

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2 looks at that and thinks that you're talking
3 about the handbag that's depicted there, and
4 then says, that's Hermes' Birkin bag. And
5 another respondent looks at that and
6 understands that you mean to refer to the
7 image, of the image that depicts a handbag?

8 MR. FERGUSON: Objection to the
9 form.

10 A. It's occurring to me that the reason
11 I don't understand your question is because
12 your question is attempting to draw a
13 distinction that doesn't exist cognitively
14 for consumers. The question is using the
15 word items to avoid being leading.

16 Had I used the word NFT in your
17 case, in the case that you just described, I
18 would have been pointing people in a
19 particular direction. And had I used the
20 word handbag, I would have been pointing
21 people in a particular direction.

22 But as I talked about earlier, the
23 confusion is confusion, the survey is asking
24 people whether they make a cognitive
25 connection between what -- it's measuring

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2 whether people make a cognitive connection
3 between what they see on the page and Hermes
4 or Birkin or the Birkin trade dress.

5 And so it's asking people who makes
6 that and they're looking at the page, and
7 they're determining whether they see
8 something that is referring to an NFT as it
9 is described on the page, made by creator
10 Mason Rothschild, or whether they're
11 referring to whether it's actually a Birkin
12 or Hermes handbag.

13 And that's based on what people
14 interpret on the page. And that whole
15 non-leading, unbiased way of seeing whether
16 people are confused hinges on the use of the
17 word items, as opposed to a much more leading
18 term like the word NFT and a much more
19 confusing word like the word NFT which could
20 either refer to a token or a placement on a
21 block chain, placement on an internet ledger
22 or it could refer to the underlying artwork.
23 And if it refers to the underlying artwork,
24 potentially the underlying artwork reflects
25 Birkin or Hermes or the Birkin trade dress.

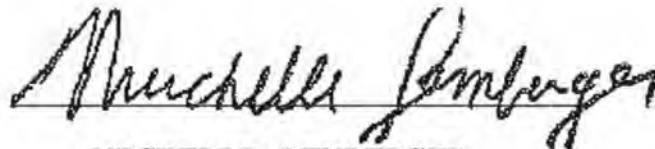
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C E R T I F I C A T E

I, MICHELLE LEMBERGER, a shorthand reporter and Notary Public within and for the State of New York, do hereby certify:

That the witness(es) whose testimony is hereinbefore set forth was duly sworn by me, and the foregoing transcript is a true record of the testimony given by such witness(es).

I further certify that I am not related to any of the parties to this action by blood or marriage, and that I am in no way interested in the outcome of this matter.

A handwritten signature in black ink, appearing to read "Michelle Lemberger", is written over a horizontal line.

MICHELLE LEMBERGER